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No. 304

IN THE

Supreme Court of the United States

October Term, 1946

THE BROWN INSTRUMENT COMPANY,
Petitioner,

vs.

SAM B. WARNER, Register of Copyrights,
Respondent.

PETITION OF THE BROWN INSTRUMENT COMPANY FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA, AND BRIEF AND APPENDIX IN SUPPORT THEREOF.

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

C. D. SPANGENBERG,
E. H. PARRY, JR.,
Of Counsel.

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List of Cases Cited.

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PETITION OF THE BROWN INSTRUMENT COMPANY FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Brown Instrument Company, respectfully prays for a writ of certiorari to the Court of Appeals for the District of Columbia to review the judgment of that Court entered on the 2nd day of June, 1946.

A transcript of the record in the case, including the proceedings in said Court of Appeals, is furnished herewith in accordance with the rules of this Court.

Summary and Short Statement of the Matter Involved.

1. Petitioner is engaged, *inter alia,* in the mathematical computation of physical phenomena such as temperature, pressure, fluid flow, etc. incident to the efficient operation of factories, power plants, etc.

2. From the mathematical tables computed by petitioner's engineers according to the necessity of the particular customer, and controlled by the particular scientific laws involved in each case, an engineering picture in the form of what is termed a "chart" is created and etched on a plate from which is printed the desired number of copies which are sold by petitioner to the customer (R. 62, *et seq.*).

3. The chart, like any other engineering curve drawn from mathematical data or computations, inevitably teaches and conveys the information of the mathematical computations from which it was drawn; for example, it will show the relation between two or more physical phenomena such as temperature, pressure, fluid flow, differential pressure, etc.

4. Each chart is intended to be used as an element to be operated upon by an ink stylus of a recording instrument. That is to say, the chart is moved at a predetermined rate per unit of time (for example, a circular chart may be rotated once in twenty-four hours), and one or more of the same or *additional* physical factors, or variations thereof, such as temperature, pressure, fluid flow, differential pressure, etc., may be recorded on the chart to teach or convey that *additional* information. In other words, the chart bears somewhat the same relation to the recording instrument that a pre-printed paper bears to a color-printing-press—the paper already has thereon original instructive or informative material to which the color-press adds *additional* data, such as color. Petitioner also makes and sells recording instruments for use with its charts.

5. Section 4 of the copyright statute (17 U. S. C. 4) provides:

> "The works for which copyright may be secured under this title shall include all the writings of an author".

Section 5 of the Statute gives the classification of the "works" of an author which may be copyrighted. Sub-Section (i) classifies as copyrightable "Drawings * * * of a scientific or technical character". Under the Rules and Regulations for the Registration of Claims to Copyright (17 U. S. C. 53: 14 Code of Fed. Regulations, Ch. II, as amended, Sec. 201.4 (9))* this classification is further described in the following language:

> "*This term includes diagrams* or models *illustrating scientific or technical works,* architects' plans, design for engineering work, relief maps, etc. * * *".

Additionally, Section 201.4(1) of the Rules and Regulations, under the heading "Subject Matter of Copyright"* states:

> "The term 'book' as used in the law includes *tabulated forms of information, frequently called charts; tables of figures showing the results of mathematical computations, such as logarithmic tables* * * *".

6. Since at least as early as 1901**, in apparent recognition of the fact that charts, such as those designed by petitioner, constituted graphic illustrations, similar in subject to and differing only in form from usual engineering graphs, it has been the practice of the Register of Copyrights to issue registrations for such charts; and since 1928 the Register of Copyrights has issued to petitioner more than 1200 registrations for charts of petitioner's creation.

7. In the latter part of December, 1943 the Register of Copyrights for the first time refused to issue copyrights to petitioner for new charts which petitioner mathematically

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* Reproduced in full in the appendix hereto.
** See Plaintiff's Exhibit 1.

computed and designed, and for which it made formal and appropriate application for registration, assertedly because of a decision by the United States Circuit Court of Appeals for the Seventh Circuit in *Taylor Instrument Co.* v. *Fawley-Brost,* 139 F. (2d) 98, in which case was involved the issues of alleged trade-mark infringement, unfair competition and copyright infringement. Finding no trade-mark infringement or unfair competition in that case, that Court, on the meagre evidence before it, and because of the absence of evidence to show that the Taylor charts there involved taught or conveyed useful information, incidentally held the Taylor copyright to be invalid. Petitioner was not a party to that case, nor were any of its charts or copyrights there involved. The evidence adduced by petitioner in the present case, as expressly found by the Courts below, specifically includes affirmative and undisputed evidence, the absence of which in the *Taylor* case formed the asserted basis for the decision of the Seventh Circuit Court of Appeals.

8. Because of the refusal of the Register to issue certificates of copyright to petitioner for the new charts it had mathematically computed, designed and printed, petitioner instituted the present suit in the District Court for the District of Columbia, seeking a declaratory judgment of copyrightability of the matter printed on its charts, and a mandatory injunction requiring the issuance to it of certificates of copyright therefor.*

9. Despite the fact that the District Court expressly found (*i. e.,* findings Nos. 6 and 8, R. 43, 44), "the charts

* It is not disputed that petitioner's applications complied with all formal requirements, and were accompanied, in each instance, by the statutory fee.

in suit were based upon mathematical or scientific calculations * * *", and that "it is perhaps possible for one skilled in the art to deduce with more or less accuracy the data or specifications upon which the charts are based * * *", the Courts below denied petitioner relief because they were of the opinion that the "real" or ultimate use of the chart was to have recorded thereon *additional* engineering data, and therefore the charts were not copyrightable even though they contained copyrightable data thereon prior to such *ultimate* use. In other words, the Courts below, *for the first time* in the administration of the Copyright Law so far as has been discovered, ignored the statutory prerequisites to copyrightability and created *ultimate use* as the determinative factor thereof. Specifically, the Court of Appeals held that *"Articles intended for practical use in cooperation with a machine are not copyrightable"*.

10. This extraordinary rule of law announced by the Court of Appeals, and upon which it based its decision in the present case, is so drastic and revolutionary, and at the same time is so manifestly erroneous, that the present petition for review by this Court is filed. The erroneousness of the rule of law will be apparent immediately upon consideration of many examples well known to everyone, but two of which need be mentioned. Motion picture films obviously have no practical use whatever except in cooperation with a machine—the motion picture projector. Similarly, stereoptican pictures have no practical use except in cooperation with the stereoptican viewer. Nevertheless, notoriously, motion picture films and stereoptican pictures are copyrightable.

Additionally, the copyright statute is entirely without words or implication as to any such limitation on copyrightability as the Court of Appeals here has created.

Further, an examination of the decision of this Court cited by the Court of Appeals as authority for its novel rule of law, viz.: *White-Smith Music Pub. Co.* v. *Appollo Co.*, 209 U. S. 1, shows that neither by language nor implication does it justify or sanction the rule created in this case by the Court of Appeals below.

11. This Court has never passed upon this question, and the new rule of law created by the Court of Appeals in this case should not be allowed to stand unless and until this Court has done so, especially where, as here, the decision of the Court of Appeals casts doubt upon the validity of more than 1200 copyright registrations which in the past have been issued to petitioner, as well as upon many additional thousands thereof that unquestionably have been issued to other computers and designers of charts or to "authors" for copyrightable material on articles intended for practical use in cooperation with a machine.

The Questions Presented.

The questions presented for review by this Court if the present petition is granted, are:

1. Is an engineering chart which graphically represents mathematical computations, and which, therefore, concededly teaches and conveys the scientific information comprised by such computations, deprived of copyrightability because ultimately it is intended to have *additional* scientific information recorded thereon?

2. Are articles, containing thereon copyrightable material, deprived of the benefits of the Copyright Statute because they are intended for practical use in cooperation with a machine?

Reasons Relied Upon for the Grant of a Writ of Certiorari.

The discretionary power of this Court is invoked upon the following grounds:

1. Because the Court of Appeals for the District of Columbia has decided an important question of copyright law in a manner which is wholly inconsistent with the Copyright Statute, and is unsupported by any decision of this Court.

2. Because the Court of Appeals for the District of Columbia has created new copyright law of far reaching, revolutionary and drastic effect, thereby casting doubt on the validity of thousands of copyright registrations which heretofore have been issued and still are in effect.

Wherefore, your petitioner respectfully requests that a writ of certiorari issue out of and under the seal of this Court directed to the Court of Appeals of the District of Columbia, commanding said Court to certify and send to this Court, on a date to be designated, a full transcript of the record of all proceedings in the Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Court as to the questions herein presented, and that the judgment of the Court of Appeals

be reversed, and that petitioner may be granted such other and further relief as may seem proper.

Respectfully submitted,

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C. D. SPANGENBERG,
E. H. PARRY, JR.,
Of Counsel.

BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI.

Opinions of the Courts Below.

The opinion of the District Court is reported in 68 U. S. P. Q. 41, and also will be found at page 42 of the record.

The opinion of the Court of Appeals for the District of Columbia is reported in 161 F. (2d) at page 910, and also will be found at page 172 of the record.

Jurisdiction.

The grounds for jurisdiction are:

1. The date of the judgment to be reviewed is June 2, 1947

2. The judgment was rendered in a Civil Action brought to determine the copyrightability of material under the copyright statute (17 U. S. C. A.).

3. The statute under which jurisdiction is invoked is Section 240(a) of the Judicial Code, 28 U. S. C. A. 347, as amended by the act of February 13, 1925.

4. Cases believed to sustain the jurisdiction are:

Baker v. *Selden*, 101 U. S. 99;
White-Smith Music Pub. Co. v. *Appollo Co.*, 209 U. S. 1.

Specification of Errors.

The errors which petitioner will urge, if the petition for writ of certiorari is granted, are that the Court of Appeals for the District of Columbia erred:

1. In holding that articles intended for practical use in cooperation with a machine are not copyrightable.

2. In failing to require the Register of Copyrights to issue to petitioner certificates of registration for petitioner's charts which, concededly, graphically illustrate tables of mathematical computations which teach and convey useful engineering information.

Summary of Argument.

The points of argument follow the reasons relied upon for a grant of writ of certiorari and are stated on page 7 of the petition, as well as in the index hereto; for the sake of brevity they are omitted at this point.

POINT I.

The Court of Appeals for the District of Columbia has decided an important question of copyright law in a manner which is inconsistent with the copyright statute, and which is unsupported by any decision of this Court.

As has been stated in the petition, and as affirmatively established by undisputed exidence (R. 62, *et seq.*), petitioner's charts are drawn from mathematical tables which, in every individual instance, are computed, according to the customer's requirements, from established scientific laws. It is believed to be obvious, therefore, that each chart, like an ordinary engineer's curve, inevitably teaches and conveys the same information that the computed mathematical tables teach and convey. In view of the fact that it is so well and long established as law that tables of figures showing the result of mathematical computation (as well as engineering curves plotted therefrom) are copyrightable, it would seem to be inevitable that each of petitioner's charts similarly is copyrightable.

It is believed to be conclusively evident, therefore, that because it accepted the *findings of fact* of the District Judge that petitioner's charts "were based upon mathematical or scientific calculations" and that it is "possible for one skilled in the art to deduce with more or less accuracy the data upon which the charts are based", the Court of Appeals was wholly without statutory justification in denying copyrightability of petitioner's charts. Indeed, the decision of the Court of Appeals is flatly contrary to the statute and to the Rules adopted for the administration thereof.

Nor do this Court's decisions in *Baker* v. *Selden*, 101 U. S. 99 or *White-Smith Music Pub. Co.* v. *Appollo Co.*, 209 U. S. 1, sanction or support the conclusion of the Court of Appeals. The *Baker* case merely held that the copyright on a book *explaining the art of bookkeeping* did not bar the *practice* of the system using the bank account sheets illustrated in the book. In other words, that case long has been authority for the proposition that an *art*—such as a method, machine or manufacture—was not the subject of a copyright, but that *original written or printed material was.* The Court of Appeals was of the apparent—and quite erroneous—impression that petitioner was seeking to copyright and thereby obtain a monopoly on an art or a method. Nothing could be further from the fact. Petitioner is not seeking to obtain a copyright for a method, machine or manufacture, nor for a piece of paper. Petitioner is seeking to obtain copyright for the *original written or printed matter* on its charts, viz.: the graphic illustration of the computed mathematical tables, *per se* made copyrightable by the statute as recognized by the Rules. Obviously, the grant to petitioner of copyrights for the printed matter on its charts vests in it no monopoly of any kind or nature. Such copyrights to petitioner would merely preclude the

copying of the *printed matter* on petitioner's charts, which matter depicts or graphically illustrates petitioner's tables of mathematical computations. Any other engineer could make his own table of mathematical computations and graphically depict them in the same manner as does petitioner, and if, by chance, the mathematical computations were the same and were depicted in the same way, a chart identical with that of petitioner would be obtained without invasion of or trespass upon any right of petitioner—*there would be no copying;* and copying, *alone,* is excluded by the statute.

The Court of Appeals apparently ignored or overlooked all considerations such as these, which immediately and dispositively show the utter want of relevancy of the *Baker* case.

Nor does the *White-Smith* case, either by language or by inference, support or sanction the extraordinary rule of copyright law announced for the first time by the Court of Appeals in this case. To the contrary, all that was decided in that case was that a perforated piano-roll was not a "copy" of sheet music, and therefore there was no copyright infringement under the law. And even on that issue—the sole issue in the case—Mr. Justice Holmes, in a separate concurring opinion indicated that it was his view, from moral considerations, that the law should be changed to prevent that manner of appropriation. There is not the slightest suggestion in either of the opinions in that case to support the proposition for which the case was cited by the Court of Appeals, namely, that articles intended for practical use in cooperation with a machine are not copyrightable.

The manifest error, as well as the injustice in and want of justification for the decision of the Court of Appeals

fittingly may be illustrated by the simple reminder that petitioner is not seeking a copyright for paper discs or sheets to be used in a machine. Petitioner is seeking merely to obtain copyrights for *the original scientific data printed on the charts.* That scientific data expressly has been made copyrightable by the statute as expressly recognized by the rules and regulations governing its administration. No authority of this Court *contra* has been or could have been cited by the Court of Appeals. It is obvious, therefore, that the Court of Appeals has misinterpreted and misapplied the two decisions by this Court upon which it relied.

POINT II.

The Court of Appeals for the District of Columbia has created a new rule of copyright law of far reaching, revolutionary effect, thereby casting doubt on the validity of thousands of copyright registrations which heretofore have been issued and still are in effect.

Where, as here, the Court of Appeals has created law in obvious conflict with the copyright statute, and without precedent by this Court, the public importance of the case hardly seems to require extended emphasis.

In the first place, the pronouncement by the Court of Appeals that "Articles intended for practical use in connection with a machine are not copyrightable" not only injects something into the statute which is not there, but also is flatly contradicted by § 201.4 (7) of the Rules and Regulations (17 U. S. C. A. 53) which expressly provides that registration may be had to protect artistic drawings (and, obviously, other copyrightable matter) *"notwithstanding they may afterwards be utilized for articles of manufacture."* Additionally, the rule originated by the Court of

Appeals also excludes from copyright many things, such, for example, as motion pictures, stereoptican views, etc. which, notoriously and universally, have been recognized and adjudicated as copyrightable. Furthermore, such pronouncement inevitably has the effect of casting doubt on the validity of thousands of copyrights still in effect which heretofore have been granted under the foregoing statutory and administrative sanctions in many industrial fields.

Never heretofore has "use" been a test of or limitation on copyrightability, and it is obvious why it has not. For example, a copyrighted picture in black and white frequently is included in a magazine form with the "real" or ultimate purpose of adding colors thereto. Thereafter, the magazine form is fed through a color-printing-press. While the ultimate colored picture may be copyrightable *per se,* it is obvious that under the copyright statute the black and white picture likewise could be (and usually is) copyrighted. The black and white picture cannot be deprived of copyrightability merely because it was intended to be used in connection with a machine to have colors added thereto. Similarly, a copyrightable poem could be etched or otherwise impressed upon a machine part which was intended for practical use with a machine. The statute does not deprive the author of the poem of his copyright therefor merely because the piece of metal upon which the poem was impressed is intended to be used as part of a machine.

These considerations are believed to crystallize the fallacy of the decision of the Court of Appeals. That Court was concerned with the "use" of *the piece of paper* constituting the chart, and completely ignored the fact that the case is concerned *only with matter printed on the paper.*

There may be justification for the impression of the lower Court that a paper chart may be considered as part

of the recording machine; but petitioner is not seeking to copyright a paper chart. To the contrary, in each instance, what petitioner seeks to copyright—and what the statute says may be copyrighted—*is the original matter printed on* the paper chart—*the graphic representation of computed mathematical tables.*

With this thought—which completely escaped the Court of Appeals below—clearly in mind, the confusion between the copyright law and the patent law evidenced by the last paragraph of the decision of the Court of Appeals becomes evident. It is too obvious to require argument that it is impossible, by means of a copyright, for one to prolong the monopoly of a patent for a machine. All that a copyright gives is the right to prevent plagiarism—the right to prevent *copying of the printed matter copyrighted.*

It is believed, therefore, that the public importance of the issue here presented necessitates a review of this case by this Court. The rights of many owners of thousands of copyrights, as well as the future administration of the Copyright Office require authoritative clarification by this Court of the situation here presented.

Respectfully submitted,

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APPENDIX.

TITLE 17 U. S. C.

§ 4 All writings of Author included. The works for which copyright may be secured under this title shall include all writings of an author.

§ 5 Classification of works for registration. The application for registration shall specify to which of the following classes the work in which copyright is claimed belongs.

* * * * * * *

(i) Drawings or plastic works of a scientific or technical character.

§ 53 Rules for Registration of claims

Section 201.4—Subject matter of copyright.

* * * * * * *

(b) Section 5 of the Act (35 Stat. 1076; 17 U. S. C. A. § 5) names the thirteen classes of works for which copyright may be secured, as follows:

(1) Books. This term includes "composite and cyclopaedic works, directories, gasetteers, and other compilations," and, generally, all printed literary works (except dramatic compositions), whether published in the ordinary shape of a book or pamphlet, or printed as a leaflet, card, or single page. The term "book" as used in the law includes tabulated forms of information, frequently called charts; tables of figures showing the results of mathematical computations, such as logarithmic tables; interest, cost, and wage tables, etc.; single poems, and the words of a song when printed and published without music; descriptions of motion pictures or spectacles; catalogues; circulars or folders containing information in the form of reading matter, and literary contributions to periodicals or newspapers.

The term "book" cannot be applied to blank books for use in business or in carrying out any system of transacting affairs, such as record books, account books, memorandum

books, blank diaries or journals, bank deposit and check books; forms of contracts or leases which do not contain original copyrightable matter; coupons; forms for use in commercial, legal, or financial transactions, which are wholly or partly blank and whose value lies in their usefulness.

For the purpose of clarifying the above paragraph as well as numbered paragraph (7) of this Section:

Expressions of mechanical principles taking the form of the slide rule, revolving disk and like devices or other "instruments or tools of any kind" (Code of Federal Regulations of Copyright Office, 201.4(b) (7)) sometimes submitted for copyright registration as "books" are not registrable as such. This is also true with respect to words, figures, symbols, etc., essential to the operation of such devices and instructions concerning their use if physically incorporated in such devices.

Provided, That such instructions if not so incorporated and other material of itself copyrightable appearing on such instrument or tool but not essential to the operation thereof, will be registered in the Copyright Office if published with a copyright notice which does not purport to copyright the instrument or tool as such. (See Section 29 of the Copyright Act).

* * * * * * *

(7) **Works of art and models or designs for work of art.** This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

Toys, games, dolls, advertising novelties, instruments, or tools or any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles, are examples. The exclusive right to make and sell such articles should not be

sought by copyright registration. (See also Section 201.4, paragraph (b) (1)).

(9) **Drawings or plastic works of a scientific or technical Character.** This term includes diagrams or models illustrating scientific or technical works, architects plans, designs for engineering work, relief maps, etc.

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REPLY BRIEF OF PETITIONER IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI.

SAMUEL E. DARBY, JR.,
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REPLY BRIEF OF PETITIONER IN SUPPORT OF ITS PETITION FOR WRIT OF CERTIORARI.

It is believed that the following few facts, crystalized by the brief for respondent in opposition to the petition for writ of certiorari, inevitably should induce this Court to grant the petition.

1. Respondent's brief expressly concedes (p. 3) that the printed matter on petitioner's charts

> "are based on mathematical or scientific calculations, and it may be possible for one skilled in the art to deduce with more or less accuracy the data or specifications upon which they are based."

2. Respondent's brief does not deny (and in fact it was proven by Plaintiff's Exhibit 1; see p. 3, par. 6 of the petition) that since as least as early as 1901 the Register of Copyrights has granted registrations for the printed matter on charts, such as those of petitioners involved in this case,

in open recognition of the fact that they constituted graphic illustrations of mathematical computations which, by the Act, were made copyrightable.

3. Respondent's brief admits (p. 4) that since 1928 the Register of Copyrights had continuously granted petitioner copyright registrations of such printed matter on petitioner's charts; and does not deny (as indeed it could not) that many thousands of such registrations issued to petitioner and other calculators and designers of such charts, and are unexpired.

4. Respondent crystalizes its theory of the case (as well as the basis for the decision by the Court of Appeals below) as an expressed fear that petitioner is seeking to obtain a *monopoly* by copyright which it could not obtain by patent grant. The fallacy of this fear, as well as of the thought upon which it is based, is the fact (which respondent and the Court below completely overlooked) that petitioner is *not* seeking to obtain a copyright on *a piece of paper* which may constitute an element of a patented or patentable mechanical combination, according to its size, shape thickness or other dimensional characteristics, but, to the contrary, petitioner is seeking copyright for *the printed matter* on its charts regardless of size, shape, thickness or other dimensional characteristics. It is believed to be too obvious to warrant further comment that *the printed matter* on the chart in no way is or can be an element of a mechanical combination. It is believed to be equally as obvious that when the printed matter constitutes a graphic illustration of scientific calculation or mathematical computation—universally heretofore recognized as copyrightable under the Act,—the necessity for review by this Court of the startling and revolutionary decision of the Court of Appeals below becomes evident. Moreover, there is no question of *monopoly* involved in copyrights. *Copying, alone, is offensive.*

5. The only decision of this Court relied upon by respondent (*Baker* v. *Seldon,* 101 U. S. 99), for reasons which at once are apparent upon the reading thereof, is wholly inapplicable to the facts of this case. Again, we earnestly assert that this Court has never passed upon the question here presented; that the question is one of vast and far reaching public importance; that the decision of the Court of Appeals below is revolutionary in character, and, as expressly conceded by respondent (p. 4), constitutes *a reversal by the Register of Copyrights of its policy for nearly fifty years,* thereby throwing a cloud on the validity of thousands of registrations still alive which, in good faith, were applied for and were granted by the predecessors of the present Register.

In view of the foregoing it is earnestly urged that the petition for writ of certiorari be granted.

Respectfully submitted,

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Counsel for Petitioner.

C. D. SPANGENBERG,
E. H. PARRY, JR.,
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THE BROWN INSTRUMENT COMPANY,
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MEMORANDUM FOR PETITIONER IN OPPOSITION TO THE MOTION OF FAWLEY-BROST COMPANY FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE.*

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

C. D. SPANGENBERG,
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MEMORANDUM FOR PETITIONER IN OPPOSITION TO THE MOTION OF FAWLEY-BROST COMPANY FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE.*

The Brown Instrument Company, which is petitioning this Court for a writ of certiorari in this cause, vigorously opposes the motion of Fawley-Brost Company, an outsider to the litigation, to file a partisan brief as *amicus curiae*, designed, for personally selfish reasons, to induce this Court to deny the writ and refuse to review the qeustions presented by the petition.

The reasons for petitioner's opposition to the motion, briefly stated, are as follows:

1. As appears on its face (p. 3, para. 7), the motion is made in disregard of Rule 27(9) of the Rules of this Court in that petitioner has refused its consent to the filing of the brief of Fawley-Brost Company. While the rule is not concerned with the *reason* consent to file such a brief is refused, the use Fawley-Brost makes of petitioner's refusal—and particularly the play on the word "private"—is

believed to warrant a brief statement of such reason. Consent was refused by petitioner because Fawley-Brost obviously could have no *proper* interest in whether or not petitioner secured copyright registration for the printed matter on charts resulting from petitioner's mathematical computations and calculations. Therefore, the only possible interest of Fawley-Brost in the case is the personal and selfish one of an avowed plagiarist. However, the case undeniably is of vast public importance because it affects the validity of thousands of copyright registrations now outstanding, not only of petitioner, but of other chart calculators as well.

2. In the next place, counsel for petitioner, a member of the Bar of this Court for more than twenty years, cognizant of his duty fairly and accurately to state the case and frame issues and questions presented by a petition for writ of certiorari, in the petition filed in this cause, has stated the case fairly and accurately and has framed the issues and questions presented, and has outlined the public importance of a consideration thereof by this Court. The motion for leave to file brief *amicus curiae* deliberately seeks to confuse those issues and questions by stating them differently and quite inconsistently therewith, and purports to support such irrelevant and unpropounded questions and issues with an asserted "counterstatement of the matters involved" which is unsupported by the record in the cause, by the petition for writ of certiorari, or by the facts. It is believed to be obvious that when a party to a litigation, for reasons deemed to be proper to its counsel, submits an issue for consideration by this Court as to whether or not it should be considered and passed upon, an outsider inevitably performs a disservice to the Court—as distinguished from serving the Court as a "friend"—deliberately to misstate the questions sought to be reviewed, as well as the material facts involved.

3. Also, it is difficult to conceive of a situation where the term "*amicus curiae*" can be more inapplicable than to Fawley-Brost Company, the motion and brief of which are so replete with inaccuracies and are so partial and biased that at times they border on the intemperate. Fawley-Brost Company is an avowed copyist and plagiarist (Motion, p. 2, para. 2). As such, unquestionably it would be fearfully interested in the issues considered by the Court *in the event writ of certiorari is granted.* But its questionable efforts to prevent a *review* of the case by this Court amply indicates the importance of and necessity for such review. The fundamental issue presented by the petition for writ of certiorari is whether or not the Register of Copyrights should issue certificates of copyright *to petitioner.* Obviously, Fawley-Brost Company has no proper interest in that question. To the contrary, and as made clear by its motion, Fawley-Brost Company's interest is to induce this Court *not* to review what is advanced by the petition for certiorari to be an unjust, inequitable and improper ruling by the Court below that *petitioner* is not entitled to copyright registration. It is obvious, therefore, that the interest of Fawley-Brost is purely personal and selfish, namely, to avoid its liability that properly might arise because of its avowed copying and plagiarism. Fawley-Brost Company certainly is not a "friend" of the Court in its present motion; it is a "friend" only of itself. And the filing of its motion in the effort to prevent review of the case by this Court is an eloquent expression of its realization that *a reversal of the judgment of the Court below is inevitable if this Court does review the case.*

4. Counsel for Fawley-Brost Company, no doubt with warranted egotism, boasts (p. 3, para. 5) that they, in effect, are the ones who have done everything that was done by the Government in the preparation for and trial of this cause. If that is the case, it certainly cannot be asserted

by them that the Government is not adequately represented. At the same time it fittingly demonstrates the want of necessity for, as well as the impropriety of, the Government filing *two* briefs in opposition to the petition for writ of certiorari—one formally by the Government (and probably prepared by counsel for Fawley-Brost if their boast is justified) in which the proprieties of presentation will be strictly adhered to according to the high standards of practice of the Department of Justice, and the other by counsel for Fawley-Brost allegedly as *amicus curiae* where the proprieties will be completely ignored if the present motion and supporting brief may be accepted as an example. It is believed that no such thing is necessary or should be permitted. It certainly is quite unfair to the petitioner to be subjected to two different attacks by the same party by the mere expedient of masquerading as *amicus curiae.* It is also believed that Rule 27(9) was framed by this Court to prevent any such situation as this from being sanctioned.

Conclusion.

For the foregoing reasons it is submitted that the motion of Fawley-Brost Company for leave to file a brief as *amicus curiae,* which brief has as its sole purpose to induce this Court not to review this case *because of the realization that if the case is considered by this Court on the merits it must be reversed,* should be denied.

Respectfully submitted,

SAMUEL E. DARBY, JR.,
Counsel for Petitioner.

C. D. SPANGENBERG,
E. H. PARRY, JR.,
Of Counsel.

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CITATIONS

762321—47——1

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 304

THE BROWN INSTRUMENT COMPANY, PETITIONER

v.

SAM B. WARNER, REGISTER OF COPYRIGHTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the District of Columbia (R. 42) is reported at 68 U. S. P. Q. 41. The opinion of the Court of Appeals (R. 172–173) is reported at 161 F. 2d 910.

JURISDICTION

The judgment of the Court of Appeals was entered on June 2, 1947 (R. 174). The petition for a writ of certiorari was filed on August 27, 1947. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether blank charts which (1) are designed and intended for use in and as essential working parts of certain specific recording machines, (2) are not intended for the purpose of giving information or explanation, and (3) have printed on their face, circular, arcuate, and straight lines so spaced as to permit their use in the recording machines for purposes of measuring variables such as temperature, pressure, etc., are works for which copyright may be secured under the copyright laws.

CONSTITUTION, STATUTES, AND REGULATIONS INVOLVED

Article 1, Section 8, Clause 8 of the Constitution and the relevant portions of the copyright laws and the regulations of the Copyright Office are set forth in Appendix A, *infra,* pp. 14–17.

STATEMENT

Petitioner is a Pennsylvania corporation which manufactures recording machines and parts and replacement parts for such machines (R. 43). It also produces numerous charts designed as working mechanical elements and essential parts of those machines (*Id.*). The charts contain printed matter such as appears on blank graph paper, and are ruled with spaced circular, arcuate, and straight lines in accordance with the mechanical characteristics of the particular machines in

which they are intended to be used (*Id.*).[1] Though these rulings on the charts are based on mathematical or scientific calculations, and it may be possible for one skilled in the art to deduce with more or less accuracy the data or specifications upon which they are based, the object of the charts is for use as parts of petitioner's recording machines and not for the purpose of giving information, and the real information they provide is that inscribed by the recording arms or styli of the machines when operated by purchasers of the machines (R. 43–44).[2] Petitioner's

[1] Two typical charts of petitioner are illustrated in appendix B, *infra*,, pp. 18–19.

[2] The recording machines manufactured by petitioner are designed to make possible the exact determination of variables like temperature, pressure, vacuum, etc., at any given time in the period of the machines' operation. Thus, a temperature-recording machine consists of a thermometer including a temperature-responsive means, a pivoted marking arm or stylus adapted to swing about its pivot in response to the temperature variations, a calibrated circular-chart element upon which the marking arm traces a line as the temperature varies, and a clock which turns the chart at a rate dependent on the period which one desires to measure on the individual chart. The chart designed for use in that machine contains concentric arcs or circles, whose spacing is such that the ink line traced by the stylus will indicate the true temperature; and with arc lines which extend from the center of the chart to the circumference and are marked to indicate variations in time. By reason of the printed arcuate time lines, the chart, in effect, serves as the face of the clock and a moving element of the clock structure; by reason of its spaced concentric temperature circles, it serves as the moving element of the temperature-responsive means.

charts are constructed solely for use in its machines and are not interchangeable with charts of competitors; it would be an accident if any of petitioner's charts should fit and accurately record on a competitor's machine (R. 59).

In 1928, after it had been selling its charts for many years without claiming copyright protection, petitioner decided to apply for their registration (R. 47–48, 52). Although the Register of Copyrights then expressed his doubts as to their copyrightability, he did register the charts, upon petitioner's insistence, leaving to the courts the adjudication of the validity of the copyrights (R. 12–16). This practice was continued until 1944, when, confronted with the decision of the Circuit Court of Appeals for the Seventh Circuit in *Taylor Instrument Companies* v. *Fawley-Brost Co.,* 139 F. 2d 98 (holding printed charts such as petitioner's not proper subject matter for copyright) and this Court's denial of certiorari in that case, 321 U. S. 785, the Copyright Office reversed its policy and rejected petitioner's further applications for registration of its charts (R. 17–20).

Petitioner thereupon instituted this suit in the District Court for the District of Columbia, requesting a declaratory judgment that petitioner's charts "are 'drawings * * * of a scientific or technical character' within the purview of classification (i) of Section 5 of the Copyright Laws

constituting writings under Section 4 of said laws and are copyrightable;" and a mandatory injunction compelling respondent to issue certificates of registration for such charts (R. 4).[3] Issue was joined by the filing of an answer to the complaint (R. 5–12), an amendment thereto (R. 29–30, 32), a counterclaim requesting a declaration of the uncopyrightability of all petitioner's charts with respect to which registration had been rejected (R. 30–32), and a reply to the counterclaim (R. 35–36). After a trial before the court without a jury (R. 46–123), the court, on February 15, 1946, announced its opinion (R. 42) and entered its findings of fact, conclusions of law, and order dismissing petitioner's complaint with prejudice and sustaining respondent's counterclaim (R. 43–45). It concluded that petitioner had "failed to establish that its charts are 'writings of an author' or 'drawings' within the meaning of the Constitution and the copyright statute, or that said charts convey or are capable of conveying the thought of an author" (R. 43), branding petitioner's contention that the charts convey information as merely "a pretext" (R. 42). Perceiving no substantial difference between the case in hand and the *Taylor Instrument Companies* case, 139 F. 2d 98, certiorari denied, 321 U. S. 785

[3] The suit was initiated against Richard C. De Wolf, Acting Register of Copyrights, but respondent, who had succeeded Mr. De Wolf, was substituted as defendant on April 30, 1945 (R. 27–28).

(R. 42), it held that petitioner was not entitled to copyright as to any of its charts (R. 44, 45).

An appeal was thereupon taken to the United States Court of Appeals for the District of Columbia, which affirmed the order of the district court (R. 172–173, 174). It held that the "evidence supports the findings and the findings require the conclusion" reached by the district court, that the *Taylor Instrument Companies, supra,* was in point and correct, and that *Baker* v. *Selden,* 101 U. S. 99, was controlling (R. 173). Adverting to the policy considerations supporting its decision, it said: "Since the machines which cooperate with the charts in suit are useless without them, to copyright the charts would in effect continue * * * [petitioner's] monopoly of its machines beyond the time authorized by the patent law" (*Id.*).

ARGUMENT

This case was decided in accordance with established principles and does not call for review by this Court.

1. Petitioner's repeated suggestions to the contrary notwithstanding (Pet. 5–6, 7, 12, 13–15), there is nothing new or startling in the rule announced below. The court held merely that petitioner's printed charts, since they are objects of use and not of information or explanation, are not subject to copyright, under the applicable

statutes.[4] That holding is clearly in accord with the rule announced by this Court in *Baker* v. *Selden,* 101 U. S. 99, as early as 1880, excluding such material from copyright privileges, a ruling that has never since been disturbed. In the *Baker* case, Selden had obtained the copyright of a book exhibiting and explaining a peculiar system of bookkeeping. The book contained, as illustrations of Selden's method, printed ledger sheets, appropriately ruled with lines and columns and provided with headings. The Court held that Selden's copyright "did not confer upon him the exclusive right to make and use account-books, ruled and arranged as designated by him and described and illustrated" in his book (101 U. S., at 107). The object of his book, said the Court, was "explanation"; the object of the art described therein was "use." "The former may be secured by copyright. The latter can only be secured, if it can be secured at all, by letters-patent" (101 U. S., at 105).[5]

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[4] Petitioner, in its endeavors to find something drastic and revolutionary in the rule of the decision, persists in ignoring its dichotomy and in erroneously characterizing it as excluding from copyright articles intended for practical use in connection with a machine, without consideration at all of whether they are designed for information or explanation (Pet. 5, 13–14). The court below applies a conjunctive rule: articles which are designed for use *and* not for information or explanation are not subject to copyright.

[5] The following statement in the Court's opinion (101 U. S., at 103) is particularly noteworthy in view of peti-

Selden's ledger sheet is obviously similar to petitioner's printed chart. Both are blank articles intended to be written upon, and both have ruled lines and headings to permit or facilitate interpretation of what is to be subsequently written upon the blanks. In both, the object is "use" and not "explanation."

When the very question presented here was put to this Court as recently as 1944, it declined to consider it. *Taylor Instrument Companies* v. *Fawley-Brost Co.*, 139 F. 2d 98 (C. C. A. 7), certiorari denied, 321 U. S. 785. The Taylor charts there involved were the very same type of charts as are here in issue. Holding such charts not copyrightable, the Circuit Court of Appeals for the Seventh Circuit said (139 F. 2d, at 100):

> Notwithstanding plaintiff's rather feeble argument to the contrary, the chart neither teaches nor explains the use of the art. It is an essential element of the machine; it is the art itself. It is our judgment that plaintiff's charts are not the proper subject of

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tioner's characterization of its charts, here in issue, as "engineering pictures" based on mathematical computations (Pet. 1–2):

"The copyright of a work on mathematical science cannot give to the author an exclusive right to the methods of operation which he propounds, *or to the diagrams which he employs to explain them*, so as to prevent an engineer from using them whenever occasion requires." [Emphasis supplied.]

copyright and that the recognition of an exclusive property right therein would be, in the words of the Supreme Court in the Baker case, "a surprise and a fraud upon the public."[6]

Petitioner is not aided by its reliance (Pet. 4–5, 11) on the following half-sentences of the district court's findings: "The charts in suit were based upon mathematical or scientific calculations * * *" (R. 43); and "It is perhaps possible for one skilled in the art to deduce with more or less accuracy the data or specifications upon which the charts are based * * *" (R. 44). Petitioner omits to point to the coordinate clauses which both lower courts deemed not only of equal, but of greater importance: "* * * but their object is for use as parts of the plaintiff's machines and not for the purpose of giving information" (R. 43); and "* * * but the real information that is to be given is that which

[6] See, in accord: (1) *Amberg File and Index Co.* v. *Shea Smith & Co.*, 82 Fed. 314 (C. C. A. 7)—a letter file index is not a proper subject for copyright, since it was "not made for explanation, but for use," notwithstanding the fact that the spaces between the letters on the tab sheets were adjusted in accord with the average requirements ascertained by the plaintiff in an extensive study of city directories; and (2) *Davis* v. *Comitti*, 52 L. T. Rep. N. S., 539 (Chanc. Div.)—a chart on the face of a barometer, consisting of a calibrated scale, is not copyrightable, for the chart had no intelligible significance independent of the barometer and could have meaning only as a part of the instrument, read in connection with its column of mercury and its movable hands or indices.

would be given by curves made by the stylus of * * * [petitioner's] recording instruments when put in operation by the purchaser of such instruments" (R. 44). The uselessness of petitioner's charts except as integral parts of its recording machines is plain when one appreciates its failure, in the face of testimony by one long experienced in the repair and servicing of its machines that he had never purchased a chart for use apart from the machines (R. 118), to adduce any evidence at all that its charts had ever been used or sold because of information they might impart independently of the recording instruments. Clearly, the charts were intended for use in the recording devices and not that they might be read, as a book, for the complex mathematical computations upon which they may have been based.

Nor is petitioner correct in its reading of the statutes and regulations of the Copyright Office (Pet. 3, 13). To urge that petitioner's charts are "Drawings * * * of a scientific or technical character" (Copyright Act, Section 5 (i), *infra*, p. 14) is to beg the question. The lower courts found that they are not. Certainly they are not so clearly embraced within the definition of that term afforded by the regulations of the Copyright Office[7] as to require reversal of the lower

[7] That definition reads as follows: "This term includes diagrams or models illustrating scientific or technical works, architects' plans, designs for engineering work, relief maps, etc." (Section 201.4 (b) (9).)

courts' concurrent findings. To the contrary, the regulations seem clearly to exclude such charts, even on petitioner's questionable assumption that they are embodiments of mathematical computations:

> Expressions of mechanical principles taking the form of the slide rule, revolving disk and like devices * * * sometimes submitted for copyright registration as "books" are not registerable as such. * * * (Section 201.4 (b) (1), *infra*, p. 15).[8]

2. Not only the authority of prior decisions but compelling considerations of policy dictated the decision below. In several of the patents whose numbers appear on the name-plates of petitioner's recording machines, the charts here in issue are specifically included as one of the operative elements covered by the claims defining the patented machines (R. 124–142; particularly, R. 137, 141–142). These patents on the recording machines endure at the most for only

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[8] The short answer to petitioner's purported fears that the rule of the decision below precludes the registration for copyright of newspapers, motion picture films, and stereopticon views (Pet. 13–14) is that the Copyright Act specifically provides for their registration (Section 5 (b): "Periodicals, including newspapers;" Section 5 (j): "Photographs;" Section 5 (k): "Prints and pictorial illustrations;" Section 5 (m): "Motion pictures other than photoplays.") (17 U. S. C. 4–5). Petitioner is, of course, unable to claim a similar Congressional recognition of the copyrightability of its printed charts.

17 years (35 U. S. C. 40). The potential life of statutory copyrights on the printed chart elements of the machines, if granted, would, on the other hand, amount to 56 years (17 U. S. C. 23). Since the charts are essential elements of the recording machines, petitioner, by securing registration of copyrights on the charts, would consequently be in a position to restrain the actual use of the patented machines for many years after the covering patents had expired. As Justice Chitty pointed out in *Davis* v. *Comitti,* 52 L. T. Rep., N. S., 539, 540 (Chanc. Div.):

> * * * It would be strange if the inventor, who, by means of a patent could obtain a monopoly for his invention for a term of fourteen years, was enabled to obtain a distinct right of copyright for a period of at least forty-two years for the letterpress on the dial, or some other essential part of his invention, and thus, after the expiration of the period for which his patent was granted, be in a position to restrain the serviceable user of some letterpress which formed an essential part of his invention. * * *

The court below, in condemning such an evasion as an obvious misuse of the patent system, was quite properly solicitous of the public interest (Cf. *Mercoid Corporation* v. *Mid-Continent Investment Co.,* 320 U. S. 661).

CONCLUSION

The decision below is in accord with established principles. Petitioner does not allege any conflict of decisions. The petition should be denied.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

PEYTON FORD,
Assistant Attorney General.

PAUL A. SWEENEY,
HARRY I. RAND,
H. L. GODFREY,
Attorneys.

OCTOBER 1947.

APPENDIX A

1. *Constitution of the United States,* Article 1, Section 8, Clause 8:

> The Congress shall have Power * * * To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

2. *Copyright Act,* March 4, 1909, c. 320 (35 Stat. 1075), 17 U. S. C. 1 *et seq.*:

> *Section 4* (35 Stat. 1076): That the works for which copyright may be secured under this Act shall include all the writings of an author.
>
> *Section 5* (35 Stat. 1076): That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs:
>
> * * * * *
>
> (i) Drawings or plastic works of a scientific or technical character;
>
> * * * * *
>
> *Provided, nevertheless,* That the above specifications shall not be held to limit the subject-matter of copyright as defined in section four of this Act * * *.

3. *Regulations of the Copyright Office* (37 C. F. R. 201.1 *et seq.,* as amended, 37 C. F. R., Cum. Supp. 1943, 201.4):

> *Section 201.4 (b) (1) Books.* This term includes "composite and cyclopaedic works, directories,, gazetteers, and other compila-

tions," and, generally, all printed literary works (except dramatic compositions), whether published in the ordinary shape of a book or pamphlet, or printed as a leaflet, card, or single page. The term "book" as used in the law includes tabulated forms of information, frequently called charts; tables of figures showing the results of mathematical computations, such as logarithmic tables; interest, cost, and wage tables, etc.; single poems, and the words of a song when printed and published without music; descriptions of motion pictures or spectacles; catalogues; circulars or folders containing information in the form of reading matter, and literary contributions to periodicals or newspapers.

The term "book" cannot be applied to blank books for use in business or in carrying out any system of transacting affairs, such as record books, account books, memorandum books, blank diaries or journals, bank deposit and check books; forms of contracts or leases which do not contain original copyrightable matter; coupons; forms for use in commercial, legal, or financial transactions, which are wholly or partly blank and whose value lies in their usefulness.

Expressions of mechanical principles taking the form of the slide rule, revolving disk and like devices or other "instruments or tools of any kind" (201.4 (b) (7)) sometimes submitted for copyright registration as "books" are not registerable as such. This is also true with respect to words, figures, symbols, etc., essential to the operation of such devices and instructions concerning their use if physically incorporated in such devices: *Provided,* That such instructions if not so incorporated and

other material of itself copyrightable appearing on such instrument or tool but not essential to the operation thereof, will be registered in the Copyright Office if published with a copyright notice which does not purport to copyright the instrument or tool as such. (See section 29 of the Copyright Act.)

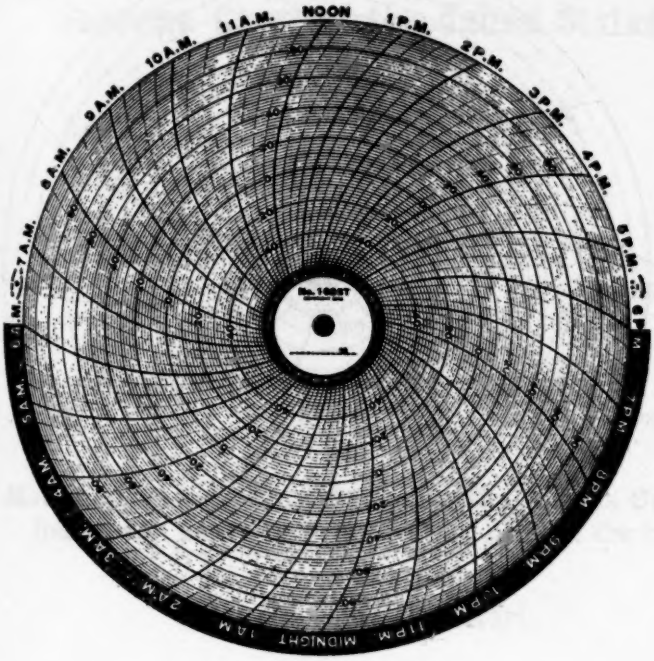
Section 201.4 (b) (7). *Works of art and models or designs for works of art.* This term includes all works belonging fairly to the so-called fine arts. (Paintings, drawings, and sculpture.)

The protection of productions of the industrial arts utilitarian in purpose and character even if artistically made or ornamented depends upon action under the patent law; but registration in the Copyright Office has been made to protect artistic drawings notwithstanding they may afterwards be utilized for articles of manufacture.

Toys, games, dolls, advertising novelties, instruments, or tools of any kind, glassware, embroideries, garments, laces, woven fabrics, or similar articles, are examples. The exclusive right to make and sell such articles should not be sought by copyright registration.

APPENDIX B

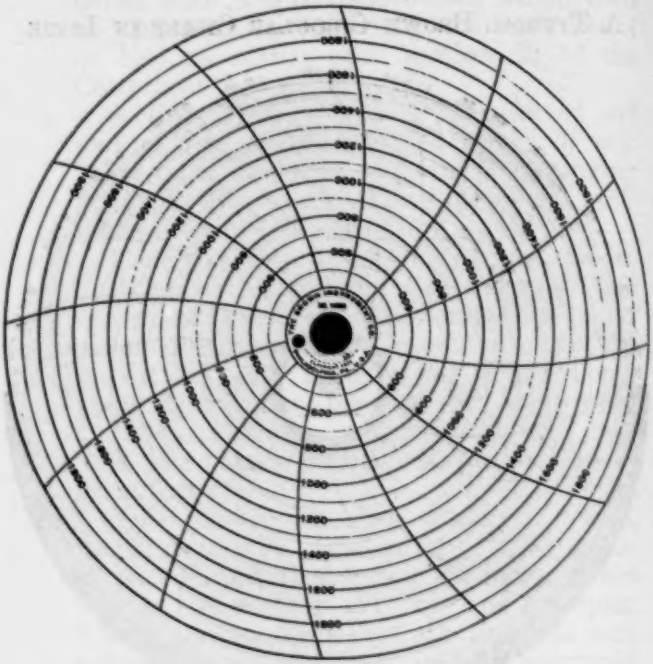
A Typical Brown Circular Chart in Issue



(17)

Another Typical Brown Circular Chart in Issue

(Other examples in Defendant's Exhibit Book 4)



U. S. GOVERNMENT PRINTING OFFICE: 1947

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FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 304

THE BROWN INSTRUMENT COMPANY,
Petitioner,

vs.

SAM B. WARNER, REGISTER OF COPYRIGHTS,
Respondent.

Motion of Fawley-Brost Company, the Amicus Curiae Below, for Leave to File Brief as Amicus Curiae,

and

Brief Opposing Certiorari.

ALBERT I. KEGAN,
ESTHER O. KEGAN,
Attorneys for Fawley-Brost Company.

THE GUNTHORP-WARREN PRINTING COMPANY, 220 WEST JACKSON, CHICAGO

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Motion of Fawley-Brost Company, the Amicus Curiae Below, for Leave to File Brief as Amicus Curiae.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The undersigned, members of the bar of this Court, as counsel for the applicant, Fawley-Brost Company, respectfully move for leave to file the accompanying brief as *amicus curiae,* in view of the following extraordinary and exceptional circumstances:

1. Applicant, Fawley-Brost Company, Inc., of Chicago, Illinois, was the successful party in *Taylor Instrument*

Companies v. *Fawley-Brost Co.*, 139 F. 2d 98, which case held that instrument charts are not copyrightable. As more fully appears in Point 2 hereinafter, at page 12, petitioner participated in the *Taylor* case with applicant's consent, and represented to this Court that certiorari in the *Taylor* case would settle the copyrightability of "such 'charts'" manufactured by it.[1] This Court denied certiorari, 321 U. S. 785 (1944).

2. Applicant is an independent printer which manufactures and sells charts used as replacement parts in machines manufactured by petitioner, which charts are copied from petitioners'. Petitioner has avowed its intention of suing applicant for copyright infringement, if it can persuade this Court to overrule the law of *Taylor* v. *Frawley-Brost*.[2]

3. Accordingly petitioner instituted this suit (a) to secure the copyright certificates prerequisite to suing applicant, and (b) to bring the rule of *Taylor* v. *Fawley-Brost* before this Court a second time. Furthermore, the Register of Copyright was selected as a particularly desirable defendant, because (a) he has no personal interest in maintaining the rule of the *Taylor* case, (b) the Copyright Office is not experienced with machines and the principles of machinery parts like the charts in issue, and (c) the Copyright Office will gain the revenue from registration fees upon machine charts, if the Register loses in this suit.

4. The Copyright Office informed the undersigned of this suit as soon as service was made on respondent's predecessor in office, and the undersigned were invited to assist respondent's counsel.

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1. No. 689, October term, 1943. Brief of Brown Instrument Co., p. 4.

2. Petitioner's counsel so informed the court below, on oral argument.

5. The undersigned, as attorneys for applicant, have worked with respondent's counsel in the Department of Justice continuously since the inception of this suit; have participated in the preparation of every paper filed herein in respondent's behalf, and in the accumulation and preparation of all the evidence presented for respondent, and have also provided the recording machine and the expert witness used by the Department of Justice on behalf of respondent. Mr. Kegan sat at the counsel table throughout both the trial and the appeal below, assisting respondent's trial attorney. In accordance with the customary practice in the Department of Justice, respondent is being represented in this Court by attorneys of the certiorari section, who heretofore have had no connection with this case, as the undersigned are informed and believe.

6. The court below appointed applicant as amicus curiae in this cause, over petitioner's vehement opposition, on full consideration of briefs directed to that issue. The Acting Solicitor General, on behalf of the Register of Copyrights, respondent herein, has consented to applicant's participation herein as *amicus curiae.*

7. Petitioner has refused to consent to applicant's appearance herein, solely on the ground that **"This controversy is a private one."**[1]

Applicant submits that whether the controversy be private or public, applicant is a real and immediate party in interest, and therefore should be permitted to file the annexed brief. The situation is analogous to that in *Universal Oil Co.* v. *Root Refining Co.*, 328 U. S. 575 (1946), where Skelly Oil Co. and its attorneys *pro se* moved for leave to appear

1. The letter from petitioner's counsel is printed verbatim as Appendix E, page 21 hereinafter, and the original has been filed with the Clerk of this Court.

as *amici curiae,* and were allowed to file briefs and even to argue orally at final hearing.

ALBERT I. KEGAN,
ESTHER O. KEGAN,
Counsel for Fawley-Brost Co. as amicus curiae.

BRIEF OF FAWLEY-BROST COMPANY, AS AMICUS CURIAE, ADVOCATING THAT CERTIORARI BE DENIED.

OPINIONS BELOW.

The Brown Instrument Company v. Sam B. Warner, Register of Copyrights, (1946) 68 U. S. P. Q. 41, 42 (R. 42).

The Brown Instrument Company v. Sam B. Warner, Register of Copyrights, (App. D. C., 1947) 161 F. 2d 910.

JURISDICTION.

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1. The judgment of the Court of Appeals was entered on June 2, 1947 (R. 174); the petition for certiorari was filed August 27, 1947.

2. The discretionary jurisdiction of the Court is invoked under the Judicial Code, section 240(a), as amended by the Act of February 13, 1925, ch. 229, 43 Stat. 938 (28 U. S. C. Sec. 347).

THE QUESTION PRESENTED.

May printed blank forms be monopolized by copyright, although they convey no message, and are indispensable mechanical parts of a machine?

COUNTER STATEMENT OF THE MATTERS INVOLVED.

1. Petitioner manufactures automatic recording measuring machines, such as thermometers, and replacement parts therefor, including replaceable paper "charts" or scales bearing printed reference lines and numerals which co-act with the pointer of the machine in the same way that similar indicia on a clock face co-act with the hands of the clock (R. 56-39). Representative charts in suit are reproduced herein as Appendices A and B, pages 17 and 18.

2. These charts are functioning structural elements of the machine, necessary to complete it and render it usable (R. 56-59, 116-118). They are consumed in large quantities by the operation of the machine (R. 58-59; Resp. Exh. 9, comprising petitioner's catalogs, catalog 64, p. 9). The computations and measurements involved in making both the machine and its chart, are for the purpose of positioning the reference graduation lines on the chart to coincide precisely with the corresponding positions of the instrument pointer (R. 43 [Finding of Fact 5], 56, 61, 15, 21, 123). The Register of Copyrights, trial court, and court of appeals all concurred in finding that the chart is an integral part of the machine (R. 17, 20, 43 [Finding of Fact 4], 173).

3. Instrument charts are blank forms, a species of blank graph paper (R. 43 [Finding of Fact 5]), as is immediately made apparent by comparing petitioner's charts, appendices A and B, with ordinary circular graph paper, appendix D, page 20. These charts contain no information, and are incapable of conveying any message (R. 43 [Finding of Fact 7] 86, 91, 97A; appendices A and B herein).

Accordingly, they are not "writings of an author" within the meaning of the copyright statute (17 U. S. C. 4) and the Constitution (Art. 1, Sec. 8, Cl. 8) (R. 43 [Finding of Fact 7]). The Register of Copyrights therefore refused to issue copyright certificates upon petitioner's charts. The tribunals below each expressly confirmed all the foregoing facts, and affirmed the action of the Register (R. 43, 173).

REASONS URGED FOR DENYING CERTIORARI.

1. The case involves nothing new or unusual. The concurring decisions below are manifestly correct, and in complete harmony with all the cases and treatises on the subject.

2. The case merely involves an obvious application of the rule announced by this Court in *Baker* v. *Selden*, 101 U. S. 99 (1879), as consistently applied by the courts and Copyright Office for 68 years.

3. This is an abortive attempt to re-try *Taylor Instrument Companies* v. *Fawley-Brost Co.*, wherein this Court has already denied certiorari.

4. Petitioner has committed itself to the position that this is purely a private controversy, and this Court is not at petitioner's disposal for settling petitioner's private matters.

5. Petitioner asks this Court to settle sham issues, which cannot be reached on the record, and which would not affect the judgments below.

ARGUMENT.

POINT 1.

The questions which petitioner attempts to raise cannot properly be presented to this Court on the record herein. Furthermore, it would be useless to consider them, since the concurrent judgments below must be affirmed on other grounds.

Petitioner asks this Court to decide whether the ultimate intended use of otherwise copyrightable matter can destroy the copyright status thereof. The question obviously is moot, since this case involves matter which clearly is uncopyrightable even when considered apart from its intended use.

Only a medium which communicates the intellectual or emotional ideas of an author to his readers can be a "writing" within the meaning of the Constitution[1] and the copyright statute.[2] As this Court has pointed out:

> "The very object of publishing a book on science or the useful arts is to communicate to the world the useful knowledge which it contains."[3]

The writing must convey information about the topic which is its subject matter; it must be a medium for the dissemination of ideas. Copyright embraces the "language employed by the author to convey his ideas more clearly".

Baker v. *Selden*, 101 U. S. 99, 103 (1879).

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1. Art. 1, Sec. 8, clause 8.
2. 17 U. S. C. 4.
3. *Baker* v. *Selden*, 101 U. S. 99, 103 (1879).

See also:

Davis v. *Comitti*, 52 L. T. Rep. (N. S.) 539 (1885).

Taylor Instrument Companies v. *Fawley-Brost Co.*, 139 F. 2d 98, 100 (7 C. C. A., 1943), cert. den. 321 U. S. 785 (1944).

Amberg File and Index Co. v. *Shea Smith and Co.*, 82 Fed. 314, 315 (7 C. C. A., 1897).

No court has even held that an article may be copyrightable even though it is not a medium of communication. Realizing that this is the law, petitioner alleges that its charts "teach and convey useful engineering information".[1] But petitioner was totally unable to prove this contention. It made no attempt to show the tribunals below how to read these charts, or any one of them. Its expert, when challenged on cross-examination, was unable to read anything from them (R. 86), and the record is devoid of any scintilla of information read from any one of the 83 charts in issue.

The opinion of the trial court states (R. 42):

> "Plaintiff's contention that these charts convey information of a scientific nature seems to be rather a pretext."

So is petitioner's representation to this Court (Petn. 13) that:

> "Petitioner is seeking merely to obtain copyrights for the original scientific data printed on the charts."

If petitioner really desired to disseminate the information used in making its charts, it would publish this information in the conventional written form in which it keeps this data for its own use. (Petn's. Exh. 8, R. 71), and which anyone can read in the ordinary way.

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1. Petn. cert. p. 10, second specification of error. Cf. p. 2, item 3 of petitioner's statement of facts; p. 6, first question presented.

The allegation that the printed matter on the charts is based on mathematical calculations and scientific principles, and that therefore these working specifications can be deduced from the charts, is pointless, since the same data can be deduced from the rest of the machine without reference to the charts. By examination of an apple pie, a cook or chemist can determine the quantitative recipe from which it was baked. The recipe obviously is subject matter for copyright; petitioner argues that the pie therefore is also copyrightable (Petn., p. 3 #3, p. 10 (pt. I)). As a matter of fact, examination of any article will reveal to the expert the mathematical and scientific specifications on which it is built. Petitioner's argument therefore would extend copyrightability to every machine and article of manufacture, no matter how ancient. Hence the decisions below were necessary to protect the fundamental principles of the patent laws.

The question whether copyrightable material loses its status because more copyrightable material will later be added to it (Petr's. issue 1) is not involved in this case, since petitioner's charts do not contain any copyrightable material conveying information in the first place. The printed matter on the chart simply functions like the lines and numerals on a yardstick, and is used solely to measure the position of the pointer of the machine, either directly or from the graph traced on the chart by the inked tip of the pointer.

As was the case with the instrument charts held uncopyrightable for that reason in *Davis* v. *Comitti*, 52 L. T. Rep. (N. S.) 539, 540 (1885), petitioner's charts "tell nothing. By reading the printed matter on the card alone no intelligible proposition is arrived at." This distinguishes these instrument charts from motion picture films and stereoptican pictures, for the latter tell their stories even to the illiterate.

Thus it is conclusively settled on the record herein and the concurring findings of fact below, that the printed matter on petitioner's charts is not "writing" within the meaning of the copyright statute and the Constitution (R. 43, 173).

This Court does not disturb concurrent findings of fact unless they are plainly without any support.

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, 178 (1938).

Williams Manufacturing Co. v. *United Shoe Machinery Corp.*, 316 U. S. 364, 367 (1942).

Goodyear Tire & Rubber Co., Inc. v. *Ray-O-Vac Company*, 321 U. S. 275, 278 (1944).

Tennessee Coal, Iron & R. R. Co. v. *Muscoda Local No. 123*, 321 U. S. 590, 604 (1944).

Furthermore, certiorari is not granted to review the evidence or inferences drawn from it.

General Talking Pictures Corp. v. *Western Electric Co.*, 304 U. S. 175, 178 (1938).

In the instant case, moreover, *there is no evidence at all to support petitioner's contentions.* Petitioner unpardonably misinformed this Court by repeatedly falsely stating that the courts below expressly found that petitioner's charts taught and conveyed useful information[1] and that such is "concededly" the case.[2] The truth is that the respondent administrative official and both courts below not only did so concede, but positively asserted exactly the opposite. Certiorari has often been denied for failure to present the case accurately and fairly.

Missouri Pacific R. R. Co. v. *Hanna*, 226 U. S. 184 (1924).

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1. Petition for certiorari, p. 4.

2. Ibid., pp. 6 (first question presented) and 10 (second specification of errors). Cf. pp. 2, 10 (point I).

Furness, Withy & Co., Ltd. v. *Yang-Tsze Insurance Association, Ltd.*, 242 U. S. 430, 433 (1917).
U. S. v. *Rimer*, 220 U. S. 547, 548 (1911).
Southern Power Co. v. *North Carolina Public Service Co.*, 263 U. S. 508, 509 (1924).

POINT 2.

Certiorari has already been denied upon the identical issue, in recent proceedings participated in by petitioner and applicant. There is no reason for this Court to consider the matter again.

Taylor Instrument Companies v. *Fawley-Brost Co.* (7 C. C. A., 1943), 139 F. 2d 98, held that instrument charts are not copyrightable, and this Court denied certiorari (No. 689), 321 U. S. 785 (1944). Petitioner Brown Instrument Co., through the chairman of its board, gave testimony in the *Taylor* case, involving the premise that petitioner's charts were legally and technologically like the *Taylor* charts there in issue.[1] Petitioner Brown entered its appearance in the *Taylor* case as *amicus curiae*, and pressed this Court to grant certiorari, pointing out that it manufactured charts like those in issue in the *Taylor* case, and that a decision on that record would settle the copyrightability of its charts. In its brief in the pending case, petitioner again recognizes that instrument charts are legally all in one category, for it states that the decision here sought to be reviewed affects the status of thousands of copyright registrations upon charts of other manufacturers.[2]

Respondent found that petitioner's charts were identical in kind with the charts in issue in the *Taylor* case, and that

1. Record in *Taylor Instrument Companies* v. *Fawley-Brost Company*, October term 1943, No. 689, p. 355 ff.

2. Petn., pp. 14, 15.

they were controlled by that precedent (R. 17, 19-20). The courts below agreed (R. 42, 173). A glance at typical charts in issue in the two cases (Appendices B and C, pages 18 and 19) shows they were right.

In the interval since certiorari was denied in the *Taylor* case, no act of Congress or decision by this Court has intervened to require or permit a re-examination of the copyrightability of instrument charts. Hence the profert of this issue should again be rejected, and the petition for certiorari denied.

Furthermore, petitioner has elected, for the purpose of affecting the presentation of the case in this Court, to make a private matter of it (Motion, item 7, p. 3 preceding); and this is not a Court for hearing private disputes.

Fields v. *U. S.*, 205 U. S. 292, 296 (1907).

Forsyth v. *Hammond*, 166 U. S. 506, 514 (1897).

Mr. Ch. J. Hughes, addressing the American Law Institute meeting. 20 Amer. Bar Ass'n J. 341 (June, 1934).

POINT 3.

The decisions below are correct, consistent with the statute, and required by long settled decisions of this Court. They announce nothing new or unusual.

The court below held (R. 173):

> "We think, moreover, that the case is controlled by *Baker* v. *Selden*, 101 U. S. 99. That case involved blank forms for use in bookkeeping. They were intended to be written on by hand. and the blank forms now in suit are intended to be written on by a machine, but this difference is immaterial. Neither sort of forms is intended to communicate facts or ideas. Both sorts are intended solely for use in making records of facts."

In the *Baker* case, this Court held that Selden's printed forms were "not the subject of copyright" because they were "blank books whose principal function is to be written upon" 101 U. S. 99, 107. The situation here is exactly the same.

The *Baker* case is universally accepted as having established "ultimate use" as a criterion of copyrightability, and as having settled the rule that copyright cannot reside in "articles of practical use."

> *Amberg File and Index Co.* v. *Shea Smith and Co.*, 82 Fed. 314 (7 C. C. A., 1897).
>
> *Taylor Instrument Companies* v. *Fawley-Brost Co.*, 139 F. 2d 98 (7 C. C. A., 1943), cert. den. 321 U. S. 785 (1944).

This Court defined the phrase "practical use" as meaning, in copyright law, the antithesis of "explanatory writing" or "literary use," 101 U. S. 99, 103, and the court below correctly used the term in the same sense when it held that "Articles intended for practical use * * * are not copyrightable" (R. 173).

> *Crume* v. *Pacific Mutual Life Ins. Co.*, 140 F. 2d 182-185 (7 C. C. A., 1944), cert. den. 322 U. S. 755.
>
> Amdur, "Copyright Law and Practice" (1936), p. 15.

Ball, "Law of Copyright and Literary Property" (1944) states the principle thus (p. 78):

> **"Utilitarian Devices.**
>
> "While the Copyright Law embraces those intellectual productions which are designed for conveying information, or explanation, or for inculcating culture and appreciation, it does not include devices or mecha-

nisms, however ingenious, whose intrinsic value is derived from their manipulation for utilitarian purposes."

The Regulations of the copyright office for years have provided that instruments or tools of any kind are not copyrightable (Code Fed. Regs., Chap. II, title 37, § 201.4 (7)); neither are "words, figures, symbols, etc., essential to the operation of such devices" (ibid., § 201.4(1)).

Motion picture film and stereoptican pictures are copyrightable because their sole value lies in the information they convey. This information can be read from them without using the stereoptican or motion picture projector, which are merely devices for magnifying, illuminating and adding the illusion of depth or motion. This brief can be thrown on a screen by a projector. Nevertheless, the "ultimate use" of the printed brief or the motion picture is to communicate ideas; the machine merely facilitates this. The "ultimate use" of petitioner's chart, on the other hand, is to be manipulated as a tool to measure some physical quantity, such as temperature. The pointer of petitioner's machine takes a predetermined position at a particular value of the temperature, speed, time or other quantity being measured. Accordingly, the reference line and numeral on the chart which indicate that value must be positioned at this one point and none other. Hence, copyright on the position of this line, or the numerical value ascribed to it, would monopolize the use of the machine. The case of motion picture film and stereoptican pictures is entirely different for the copyright monopolizes only the story told by the particular picture, and does not prevent the machine from being used with thousands of other pictures.

This exposes the vice of petitioner's "poem" argument. For when it asserts that it is entitled to statutory monopoly

upon a poem impressed upon a machine part (Petn. 14), it is obvious that the real intent is not to protect the literary work in the poem, but to obtain a monopoly upon the machine part, and thus upon the machine.

The assertion of copyright in machine charts has been consistently used to force the owner of the machine to purchase these unpatented replacement parts solely from the vendor of the machine.[1] This is an affront to the Antitrust Laws, which the decision below will correct.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

.....

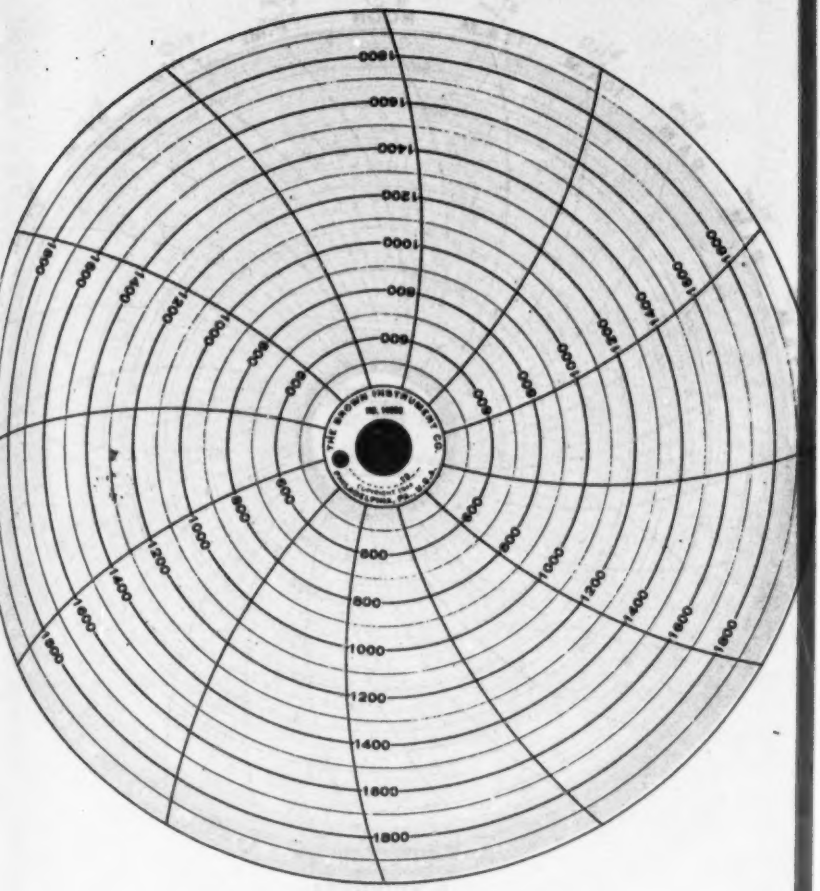
ALBERT I. KEGAN,

.....

ESTHER O. KEGAN,

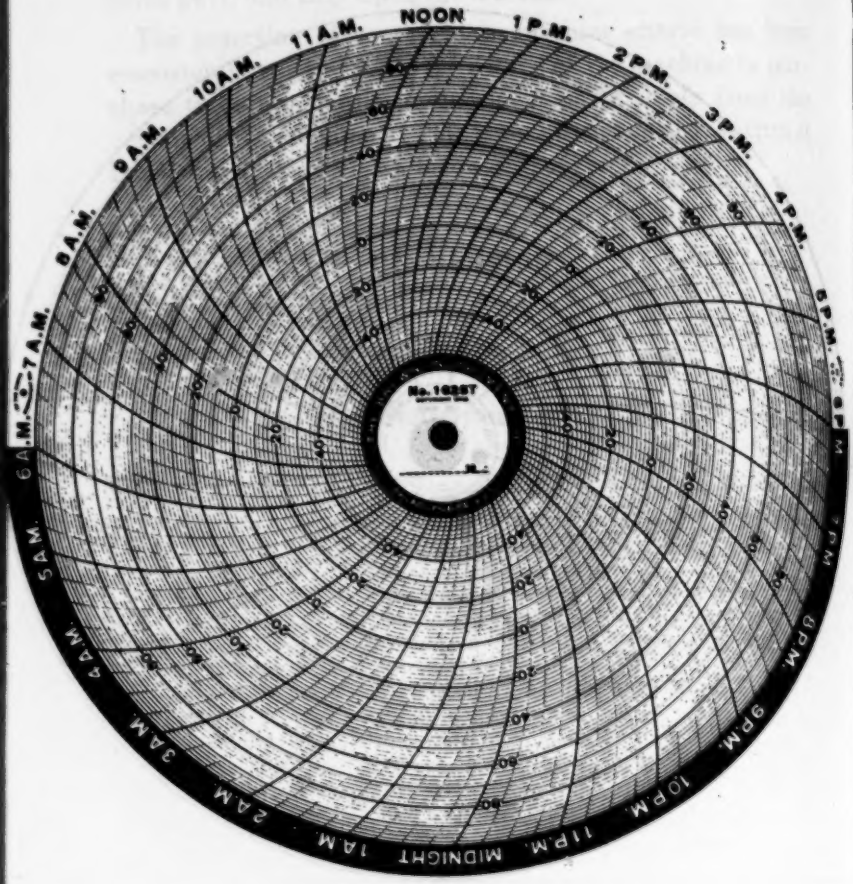
Attorneys for Fawley-Brost Co.

1. Testimony of petitioner's chairman *Brown* in the *Taylor* case, No. 689—1943 term, *Taylor* R. 356, 358.



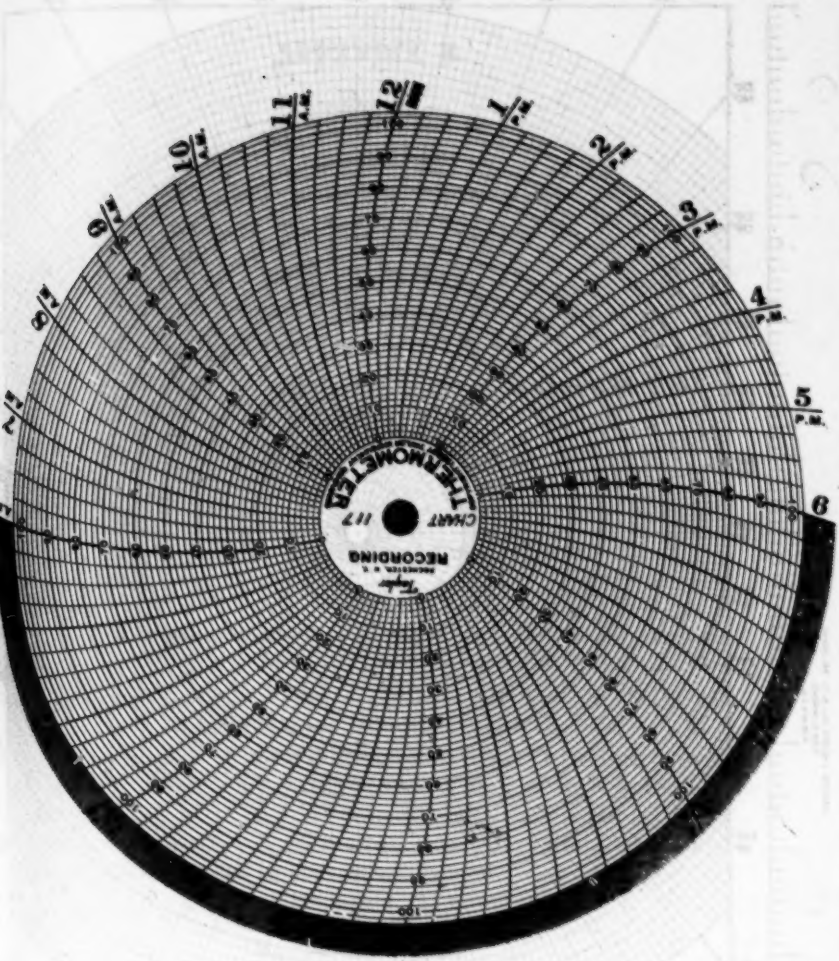
APPENDIX A.

One of Petitioner's Charts In Issue.



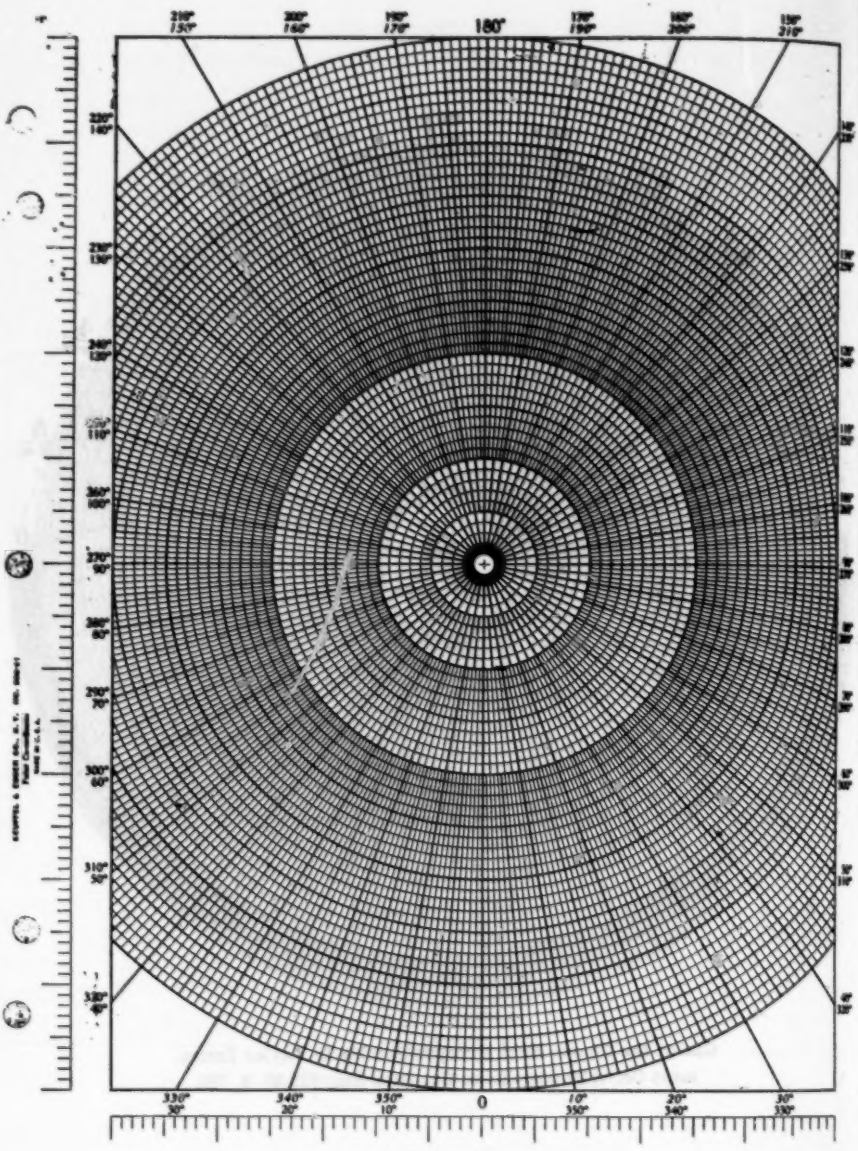
APPENDIX B.

Another of Petitioner's Charts In Issue.



APPENDIX C.

One of the Charts Held Uncopyrightable in Taylor Instrument Co. v. Fawley-Brost Co., cert. den. 321 U. S. 785.



APPENDIX D.

Ordinary Circular Graph Paper.

APPENDIX E.

DARBY & DARBY
Attorneys and Counselors at Law
Patents, Trademarks, Copyrights
Chrysler Building
405 Lexington Avenue
New York 17, N. Y.

August 26, 1947

Albert I. Kegan, Esq.
Kegan and Kegan
29 South La Salle Street
Chicago 3, Ill.

Re: *Brown Instrument Co.* v. *Warner*

DEAR MR. KEGAN:

This will acknowledge receipt of your favor of August 25th requesting consent to your filing a brief *amicus curiae* in the above case in which a petition for writ of certiorari will be filed by the plaintiff this present week.

Unfortunately I am unable to consent. This controversy is a private one and involves as its only issue whether or not the plaintiff is entitled to copyright registration for its original writings. Neither you nor your client can have any proper interest in that question.

With best personal regards, I am

Very truly yours,

(signed) SAMUEL E. DARBY, JR.